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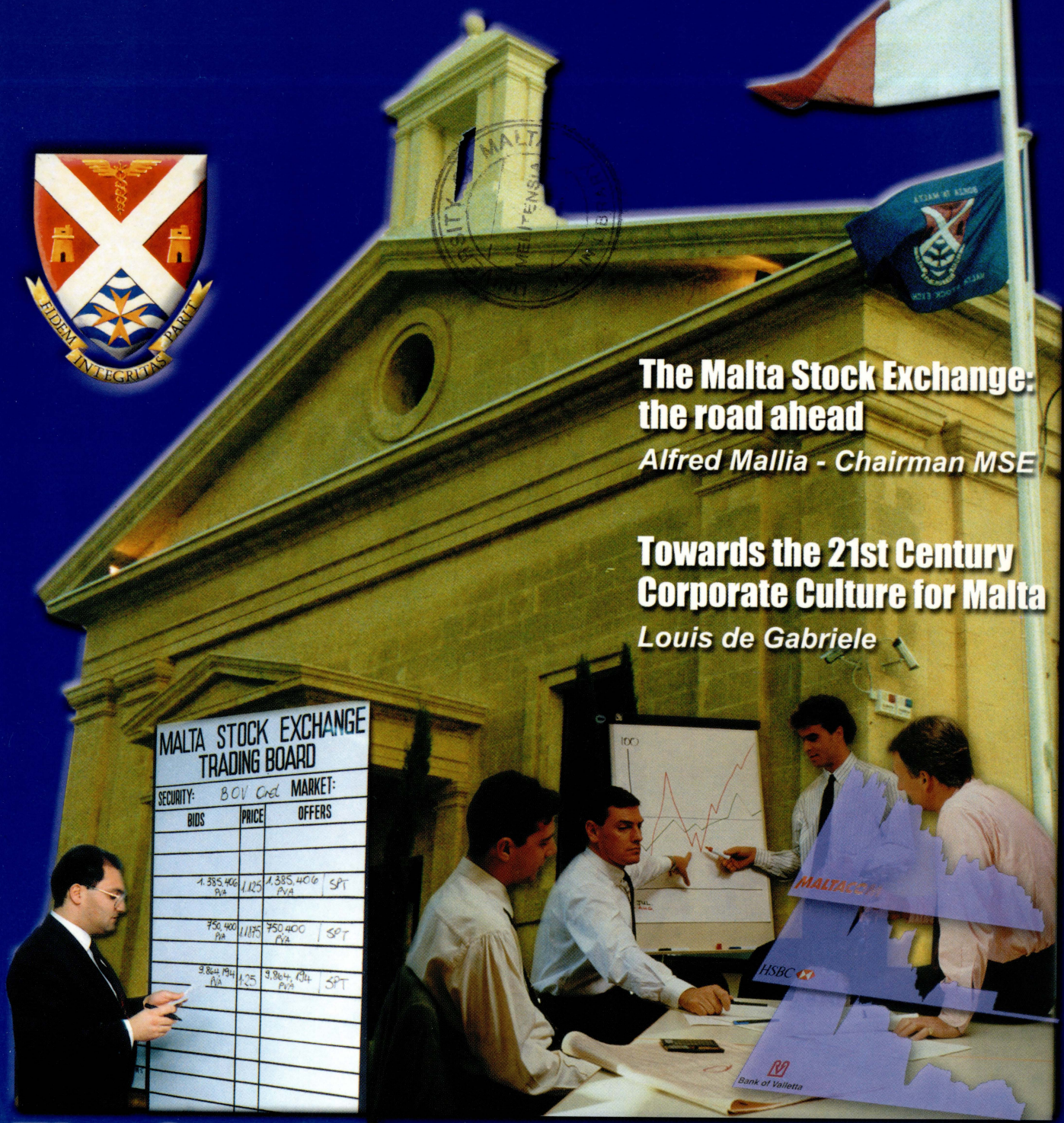

The Malta Stock Exchange: the road ahead

Alfred Mallia - Chairman MSE

Towards the 21st Century Corporate Culture for Malta

Louis de Gabriele

The Stock Exchange and the listing process - *what have we learnt so far?*

The Malta Stock Exchange Tribunal and Insider Dealing

– a note on the Tribunal and the first three concluded cases

THIS ARTICLE ATTEMPTS to highlight some significant aspects of the first three cases submitted to the Malta Stock Exchange Tribunal. All these three cases have now been concluded and at the time of writing no proceedings are pending before this Tribunal. This may therefore be a good occasion to review the performance of this Tribunal and the effectiveness of our insider dealing law.

Our first ever rules on insider dealing were introduced by the Malta Stock Exchange Act of 1990. The establishment of the Borsa and a regulatory framework for the listing and trading of shares would have been incomplete without clear rules prohibiting and punishing insider dealing. The Act also established the Malta Stock Exchange Tribunal (MSET). This was assigned a rather mixed bag of roles to play, including jurisdiction to investigate suspected cases of insider dealing, a role which may have overlapped with the regulatory functions of the Council.

Under the 1990 Act, the principal function of the Tribunal is to investigate allegations or suspicions of insider dealing or other "irregular practices in Exchange dealings" on the Malta Stock Exchange. The MSET has no criminal jurisdiction, and therefore cannot fine or send wrongdoers to prison. It is the only authority which has an express power under Maltese law to order persons found criminally guilty of insider dealing to pay compensation to an injured party who has suffered financial loss. The ordinary law, including our civil, commercial and company laws, does not contain any similar provision anywhere. No such award has ever been given.

The Insider Dealing Act of 1994 makes no reference to the MSET, which is rather strange and unhelpful. This Act is largely a part of the criminal law. It establishes an extensive number of insider offences, listing a series of circumstances when such offences may be committed. It does not provide any civil remedy for losses suffered consequent to a breach of the insider dealing provisions.

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The Tribunal consists of a Chairman, who must have a legal qualification, and two other members. It is appointed for a period of three years. It is currently composed of the same persons constituting the Financial Services Tribunal (FST). Established under the Banking Act of 1994, some of the relevant provisions were clearly modelled on the rules governing the MSET in an evident attempt to bring the two tribunals structurally closer together.

The last two of the three cases so far determined by the MSET concerned suspected insider dealing. One may disclose at the outset that in neither of these two cases was insider dealing established. This means that ten years after the introduction of the first ever insider dealing rules in Maltese law in the 1990 Act and eight years from the adoption of the Insider Dealing Act of 1994, no Maltese court, Tribunal or administrative body has ever established that an insider dealing act was committed in Malta. In these circumstances, one concludes either that no insider dealing has ever been committed in relation to dealings on the Malta Stock Exchange, or that nobody has yet been caught doing it.

Once no criminal activity was established, these cases lack that certain dramatic aura. This notwithstanding, the Tribunal's decisions remain interesting for a number of reasons. They once again confirm that Directors remain the primary insiders par excellence, and consequently the most exposed to possible suspicions on insider wrongdoing. As the main depositaries of company secrets, they are expected not to make abusive profits from them by directly transacting in company shares or assisting others in unlawful ways to do so. When they act in breach of these obligations, they may find themselves having to render an account to the Tribunal. The Tribunal may then recommend the taking of administrative measures against the wrongdoer and it may report its findings to the Police.

The following is a brief summary of the decisions given in respect of the first three cases so far submitted to the MSET in terms of section 26 of the Malta Stock Exchange Act 1990. In several respects, these decisions ought to be recognized as an additional important source of law. They are helping in the evolution of the law on insider dealing and market abuse. Their conclusions offer useful guidance for future cases that may arise.

Malta Stock Exchange Tribunal decision - Case number 1

Prolonged suspension of trading of a listed security; minority rights; case withdrawn by joint declaration of the parties.

The very first case that had been submitted to the Tribunal revolved around a complaint by the minority shareholders of a leading listed bank, the then Mid Med Bank plc, against the prolonged suspension by the Malta Stock Exchange of all trading in the bank's shares pending the proposed acquisition of the majority shareholding from government by HSBC.

When the proceedings were opened in 1999, the Council of the Exchange had immediately pleaded that the Tribunal had no competence to hear the case. It argued that the phrase "alleged or suspected irregular practices on the Exchange", used in the Malta Stock Exchange Act section dealing with the Tribunal's competence, could not reasonably be interpreted to extend to regulatory decisions of the Council itself. The Exchange tried to convince the Tribunal that the phrase under review applied exclusively to the behaviour of stockbrokers or investors, and was not meant to create a remedy of oversight over the regulatory agency's own supervisory conduct.

No decision was given in this first case because the case was eventually withdrawn following a joint declaration issued by the two parties on the 13th January 2000. In their joint declaration, the minority shareholders declared that they accepted the explanations given by the Exchange for the prolonged suspension that occurred. During the course of the proceedings, the Exchange had introduced new bye-laws to safeguard the interests of minority shareholders in the event of a possible de-listing. This step helped to safeguard the position of the minority shareholders who clearly feared a possible de-listing of their shares, a step which could have had a negative impact over the marketability and value of their shares. This case does not contribute any relevant development to the rules governing directors, as it was instead focused on the performance of the regulatory agency.

Malta Stock Exchange Tribunal decision - Case number 2:

investigation into alleged insider dealing; proposed increase in share capital; competence of the Tribunal; the concept of unpublished price sensitive information of a precise nature; level of proof required

Towards the end of 2000, the Malta Stock Exchange Tribunal concluded its first ever inquiry into an alleged instance of insider dealing. The allegation concerned The Chairman of a local bank whose shares are listed on the Malta Stock Exchange. The Tribunal decided that the allegations were completely unfounded. The allegation arose from an interpretation of a series of circumstances related to an increase in the company's share capital that had been agreed at a Board meeting, and the subsequent acquisition of a relatively small number of shares by the foreign corporate shareholder represented by the Chairman.

The Tribunal has competence to investigate allegations of "alleged or suspected irregular practices in Exchange dealings". Noting that the 1990 Act did not define this phrase, the Tribunal interpreted it as covering "all kinds of mischief and wrongdoings, be they great or small", certainly including acts of insider dealing but not exclusively limited to them. The Tribunal noted that a specific law on insider dealing, adopted by Parliament in 1994, had produced a new definition of the offence, quite different from the original definition introduced by the 1990 Act. The Tribunal reasoned that following the passage of the 1994 Act, it should apply the new definition of insider dealing given in the new Act. It noted the legal provision in the 1994 Act that only individuals could be found guilty of criminal insider dealing, but the Tribunal decided that it could still investigate corporate wrongdoing in relation to suspected irregular practices within the framework of the 1990 Act.

The Tribunal reasoned that the whole case before it depended on proof that there had been wrongful use of unpublished price sensitive information "of a precise nature". If this aspect was not proven, the case fails. It found that no "concrete" information had been available at the time that the share purchases were made: "The information at the time was sketchy and far from complete.". The information then available was not such that if made public could have had a significant impact on the price: "...the information relating to the rights issue available at the time the purchases were made was so scant that it could not have significantly effected the price of the (bank's) shares had it been made public. It is relevant to point out that the law uses the word significant, meaning that it is not concerned with trivial information which only slightly affects the price."

The Tribunal concluded that that the persons in question had acted correctly, and that there were no sufficient grounds to justify further investigating the allegation.

Decision taken by the Malta Stock Exchange Tribunal on the 6th October 2000

Malta Stock Exchange Tribunal decision - Case number 3:

decision on alleged insider dealing; announcement of a rights issue; announcement of profits; position of the director/ deputy-chairman of a listed company

This case involved the same listed company as in Case no. 2. Here too the Council of the Malta Stock Exchange referred the case for consideration by the Tribunal, primarily to establish whether there was a prima facie case of insider dealing other irregular practice on the Exchange. The case related to the acquisition by a company director of shares in the company within the two-month so-called "freeze period" prior to the announcement of the financial results at a board meeting. The question before the Tribunal was in simple terms whether the acquiring director was in possession of unpublished price sensitive information when he bought the shares and whether he had violated the two-month ban. The reason behind the ban is to establish a clear parameter to regulate share

dealings by directors during what may be considered a suspect period with the company about to reveal details of its financial performance. In this period, directors and other insiders may easily come across sensitive and significant information which may tempt directors and other insiders to make a quick kill or seek to avoid an imminent loss – a classical insider dealing scenario.

The difficulty really concerned the announcement of the board meeting when the company's financial results were to be disclosed. The original date indicated for such meeting was later moved forward. The result was that the deputy–chairman of the company bought the shares at a date that would have originally been outside the freeze period under the original date, but that eventually came within the prohibited period when the meeting was eventually called for an earlier date than that announced. This caused some uncertainty as to the precise date when the two-month ban would start running.

The Tribunal remarked that as a general rule, unless otherwise provided in some regulation, "a director of a company listed on the Exchange has the right to deal in shares of the company". It added that "a director should not be unnecessarily precluded from actively participating in the company in which he occupies the office of director by way of dealing in its shares.". The Tribunal explained that although, technically, the director had breached the bye-law in question, he had been misled ("zgwidat"). It therefore found no evidence of insider dealing or other irregular practice as the director in question could not have known, at the time of the transaction, that his acquisition had accidentally strayed into the prohibition period.

In reaching its conclusion, the Tribunal sought evidence of actual practice from the listed public companies with regard to the calling of board meetings for the announcement of the financial results. In a somewhat surprising move, the Tribunal also proceeded to instruct the listed companies, who were not party to the proceedings, to establish fixed dates for the holding of the board meetings where the financial results would be disclosed, and directed that such dates should under no circumstances be brought forward. In this manner, the Tribunal sought to achieve certainty as to when the two-month prohibition period was to start running.

It is arguable whether the Tribunal had the power under the 1990 Act to issue the latter directive, which is of a regulatory nature and would appear to be more properly exercisable by the regulatory authority itself, namely the Council as the listing authority. It may have been more formally correct for the Tribunal send it as a recommendation to the Council for implementation by way of a bye-law or some other manner.

Proposed amendments to the Malta Stock Exchange Act 1990

During the course of a public seminar organised by the Malta Stock Exchange some months ago, the Council of the Exchange announced a set of legislative reform proposals it was submitting to Government. These include doing away with the Malta Stock Exchange Tribunal, which has been the subject of this paper. In its stead, the Council was proposing to extend the competence of the existing Financial Services Tribunal also to regulatory decisions taken by the Council, in the same manner applicable to the other competent authorities. Set up under the Banking Act, the Financial Services Tribunal already enjoys jurisdiction which extends to decisions taken by the competent authorities under the Investment Services Act, the Financial Institutions Act and the insurance legislation. By extending it also to decisions taken by the Council of the Malta Stock Exchange, the overall position would be better streamlined and consistent.

By virtue of other proposed amendments, the Council would henceforth assume responsibility for investigating alleged cases of insider dealing on the Exchange, rather than refer them to the Malta Stock Exchange Tribunal as at present. (It may be predicted that should in the future the current responsibilities of the Council should be assumed by a single financial services regulatory body, then such oversight responsibilities would be transferred accordingly.) It was also revealed that a series of new offences would be recognized in the Insider Dealing Act 1994 which currently only captures strictly insider dealing offences. This shall now punish various forms of market abuse including market manipulation, spreading of false rumours and creating a false market in listed shares.

(This article reflects solely the author's personal opinion, and does not represent the views of any institution or body. Some of the views expressed in this article have already appeared in an earlier article by the same writer, "The functions and first two decisions of the Malta Stock Exchange Tribunal", published in The Company Lawyer, Vol 22 No 8, August 2001, Sweet and Maxwell)